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19 *Lead Counsel and the EEOC, on behalf of the Plaintiff Class Members and EEOC*

20 **UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

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22 OCAMPO, ENCARNACION GUTIERREZ,  
23 JOHAN MONTOYA, JUANCARLOS GÓMEZ-  
MONTEJANO, JENNIFER LU, AUSTIN CHU,  
IVY NGUYEN, ANGELINE WU, ERIC FIGHT,  
CARLA GRUBB, DAVID CULPEPPER,  
PATRICE DOUGLASS, and ROBAIR  
SHERROD, BRANDY HAWK and ANDRE  
STEELE, on behalf of themselves and all others  
similarly situated,

24 Plaintiffs,

25 v.

26 ABERCROMBIE & FITCH STORES, INC., A&F  
27 CALIFORNIA, LLC, A&F OHIO, INC., and  
28 ABERCROMBIE & FITCH MANAGEMENT  
CO.,

Defendants.

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Case Nos. 03-2817 SI,  
04-4730 SI, and  
04-4731

**MEMORANDUM IN SUPPORT OF  
LEAD COUNSEL AND EEOC'S  
APPEAL OF SPECIAL MASTER'S  
DECISION REGARDING  
ABERCROMBIE'S MOTION TO  
DISMISS DISPUTE RESOLUTION  
AND ENFORCEMENT  
PROCEEDINGS**

**Before Judge Susan Illston**

ELIZABETH WEST and JENNIFER LU,

24 Plaintiffs,

25 v.

1 ABERCROMBIE & FITCH STORES, INC., A&F  
2 CALIFORNIA, LLC, A&F OHIO, INC., and  
3 ABERCROMBIE & FITCH MANAGEMENT  
CO.,

4 Defendants.  
5

6 EQUAL EMPLOYMENT OPPORTUNITY  
7 COMMISSION,  
8

9 v.  
10

11 ABERCROMBIE & FITCH STORES, INC., A&F  
12 CALIFORNIA, LLC, A&F OHIO, INC., and  
13 ABERCROMBIE & FITCH MANAGEMENT  
14 CO.  
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16 Defendants.  
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1 The EEOC and Lead Counsel (collectively, “Plaintiffs”) jointly move for an order  
2 overturning the Special Master’s decision regarding Abercrombie’s Motion To Dismiss Dispute  
3 Resolution And Enforcement Proceedings (the “Special Master’s Decision”). The Special Master  
4 has ruled that Plaintiffs may not seek enforcement of the Decree’s marketing diversity  
5 requirement. However, the Decree provides a mechanism for the enforcement of this  
6 requirement, which Plaintiffs have followed. Furthermore, to have meaning, the requirement  
7 must be enforceable. Therefore, by this motion, Plaintiffs seek an order reversing the Special  
8 Master’s Decision and allowing Plaintiffs to move forward with their efforts to enforce the  
9 marketing diversity requirement.

## 10      I.      JURISDICTION

11 The Consent Decree (hereafter the “Decree”) authorizes the Court to provide  
12 Plaintiffs the relief sought by this appeal: “This Court shall retain jurisdiction of these civil  
13 actions during the duration of the Decree solely for the purpose of entering all orders, authorized  
14 hereunder, that may be necessary to implement the relief provided.” Decree, § V. The Decree  
15 includes a marketing diversity requirement: “As a company committed to achieving diversity in  
16 its store associates, as reflected in the other terms of this Decree, Abercrombie will reflect  
17 diversity, as reflected by the major racial/ethnic minority populations of the United States, in its  
18 marketing materials (taken as a whole).” Decree, § X.C.1. More generally, the Decree also  
19 enjoins Abercrombie from “enacting, maintaining or implementing any policy or procedure that  
20 discriminates against” minorities on the basis of race or national origin or women on the basis of  
21 gender. Decree, §§ X.A.1. & 2.

1 end this dispute resolution process (the “Motion To Dismiss”). On May 6, 2008, the Special  
 2 Master granted Abercrombie’s Motion to Dismiss.<sup>1</sup>

3 Plaintiffs believe the Special Master “wrongly interpreted [and] applied” the  
 4 Decree.<sup>2</sup> Therefore, Plaintiffs respectfully request that the Court overturn the Special Master’s  
 5 Decision and enter an Order (1) declaring that the Monitor’s use of census numbers to measure  
 6 compliance with the marketing diversity requirement is appropriate and (2) ordering the parties to  
 7 meet and confer with the Monitor regarding what steps Abercrombie should take to ensure future  
 8 compliance with the marketing diversity requirement.<sup>3</sup>

9 **II. BACKGROUND**

10 **A. The Decree Requires Marketing To Be Diverse.**

11 The Decree contains a straightforward and unambiguous marketing diversity  
 12 requirement: “As a company committed to achieving diversity in its store associates, as reflected  
 13 in the other terms of this Decree, Abercrombie will reflect diversity, as reflected by the major  
 14 racial/ethnic minority populations of the United States, in its marketing materials (taken as a  
 15 whole).” (Decree, § X.C.1., p. 19 (the “marketing diversity requirement”).) There is no  
 16 limitation anywhere in the Decree on Abercrombie’s obligation to comply with this requirement.  
 17 Simply put, Abercrombie must comply with it. But there are limitations on when Lead Counsel  
 18 and the EEOC may assert that Abercrombie has not satisfied the requirement. Set out below for  
 19 ease of reference is the entirety of the Marketing section of the Decree (Section X.C.), along with  
 20 Section X.B.4., which is also at issue in Abercrombie’s Motion To Dismiss.

21 § X.C. Marketing.

22 1. Abercrombie believes that the artistic aspect of its marketing  
 23 materials is a critical factor driving the success of Abercrombie and  
 24 its brand. As a company committed to achieving diversity in its  
 25 store associates, as reflected in the other terms of this Decree,  
 26 Abercrombie will reflect diversity, as reflected by the major

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27 <sup>1</sup> Attached are the Special Master’s Decision and its Decision denying Plaintiffs’ Motion for  
 28 Reconsideration and/or Clarification.

<sup>2</sup> Under Section X.B.7., the Special Master’s Decision “shall be affirmed unless the Court  
 29 determines that the Special Master made clearly erroneous findings of fact or wrongly interpreted  
 30 or applied the Consent Decree.”

<sup>3</sup> If the parties cannot agree, then the Court should order appropriate relief under Section X.B.5.

1 racial/ethnic minority populations of the United States, in its  
 2 marketing materials (taken as a whole). Lead Counsel and/or the  
 3 EEOC may assert that Abercrombie has not met its commitment  
 4 under this paragraph for the following purposes only:

5       a. In the event that, at the end of the twenty-four (24)  
 6 month period following the Approval Date, the Applicant Rate for  
 7 any Minority group is lower than such group's interim Benchmark  
 8 for the fourth six-month period, Lead Counsel and/or the EEOC  
 9 may assert that this was caused by a chilling of applicant flow  
 caused in part by not meeting the commitment in paragraph 1 of  
 this Section. Any such assertion, and Abercrombie's response  
 thereto, may be considered by the Special Master. If the Special  
 Master accepts the assertion of Lead Counsel and/or the EEOC,  
 then the sole remedy shall be that the applicable interim Benchmark  
 shall remain in effect unless and until the applicable Applicant Rate  
 exceeds the applicable interim Benchmark.

10     b. In the event that Abercrombie seeks to obtain early  
 11 termination of this Decree, under Section VI.B. hereof, and in the  
 12 event that Lead Counsel and/or the EEOC seeks to challenge such  
 13 early termination, Lead Counsel and/or the EEOC may assert that  
 14 Abercrombie has not met its commitment in paragraph 1 of this  
 15 Section. Any such assertion, and Abercrombie's response thereto,  
 16 may be considered by the Special Master and/or the Court, along  
 17 with Abercrombie's meeting or failing to meet other provisions of  
 18 the Decree, in deciding whether to grant Abercrombie's request for  
 19 early termination of the Decree.

20     2. Nothing in this Section shall limit the scope of the Monitor's  
 21 discretion under Section XVI.A.2. of this Decree in evaluating  
 22 compliance (including barriers to compliance) with any of the  
 23 objectives of the Decree. However, nothing in this Section or  
 24 otherwise in this Decree shall be deemed to provide Lead Counsel,  
 25 the EEOC, the Monitor, the Special Master, or the Court with the  
 authority or ability to contest, challenge, alter, or seek to alter  
 Abercrombie's marketing materials or the selection of photographs  
 or models therefor.

26     3. Marketing materials include specifically, but not exclusively:  
 27 quarterly magazines and similar materials, shopping bags, store  
 28 posters and video, website, A&F TV, and purchased advertising.

29       **§ X.B. Dispute Resolution and Enforcement Procedures.**

30       . . . 4. Lead Counsel, EEOC or Abercrombie shall have the right  
 31 to initiate steps to resolve any dispute or issue of compliance  
 32 regarding any provision of the Decree subject to limitations and  
 33 standards set forth in the Decree. . . .

1                   **B. The Monitor Has Found That Abercrombie Failed to Satisfy the Marketing**  
 2                   **Diversity Requirement For Both of the First Two Years of the Decree, But**  
 3                   **the Parties Have Not Been Able to Develop a Means to Achieve Compliance**

4                   At the close of the first year of the Decree, the Monitor concluded that  
 5                   Abercrombie had failed to satisfy the marketing diversity requirement based on a comparison  
 6                   with the general population census statistics of the United States. Abercrombie disputed this  
 7                   conclusion. At the first status conference, the Court encouraged Abercrombie to comply with the  
 8                   marketing diversity requirement. The Court expressed concern about the low level of diversity in  
 9                   the marketing material, stating: “Marketing in this company’s arsenal of tools is different from  
 10                   maybe some other companies’, and it relies heavily on the visual presentation of models.” Trans.  
 11                   at 24:11-14. The Court also observed that in regards to the demographics of the models depicted  
 12                   in marketing materials: “I would just think that’s one of the easiest things in the world to change.  
 13                   You just hire those people, you know, to take their position. That has to be a really simple thing  
 14                   to do.” *Id.* at 35:23-25. Little has changed, however.<sup>4</sup>

15                   On June 25, 2007, Plaintiffs wrote to Abercrombie requesting information  
 16                   regarding the marketing in anticipation of the second annual status conference before Judge  
 17                   Illston. On July 5, 2007, Abercrombie replied that Plaintiffs are not entitled to marketing data.  
 18                   (The argument made in that letter is replicated in Abercrombie’s pending Motion To Dismiss.)  
 19                   On August 15, 2007, Plaintiffs explained the basis for their position. On August 22, 2007,  
 20                   Abercrombie responded by providing the sought-after information.

21                   At the close of the second year of the Decree, the Monitor again found that  
 22                   Abercrombie had failed to meet the marketing diversity requirement. *See Executive Summary of*  
 23                   *Court Approved Monitor’s Second Annual Compliance Report* at 1-2. At the second status  
 24                   conference, the Court reiterated its concern about inadequate diversity in marketing, remarked  
 25                   that increasing the diversity should not be difficult, and urged the parties to work with the  
 26                   Mediator to try to resolve the dispute over Abercrombie’s compliance with the marketing  
 27                   diversity requirement.

28                   <sup>4</sup> In fact, perhaps the most relevant change during the past several years has been the change in  
 29                   the store sales associate position title from “Brand Representative” to “Model.” Plaintiffs are  
 30                   concerned that this change reinforces the significance of the marketing material as a hiring guide.

1                   The parties met in Chicago on October 23, 2007, under the Mediator's supervision,  
 2 to discuss the issues. Beforehand, the parties presented the Mediator with short summaries of  
 3 their positions. After the session, under the Mediator's guidance, the parties agreed that Plaintiffs  
 4 would refrain from bringing a formal motion regarding the marketing, to allow Abercrombie time  
 5 to formulate a compromise proposal to achieve compliance. On December 3, 2007, Abercrombie  
 6 "report[ed] on its continuing compliance" with the Decree but did not formulate a proposal.

7                   **C. Procedural Background Leading To The Special Master's Decision**

8                   On December 10, 2007, Plaintiffs gave formal notice of their intent to move for an  
 9 order requiring Abercrombie to comply with the marketing provision in the Decree, incorporating  
 10 by reference the findings contained in the Monitor's second annual report, in compliance with §  
 11 X.B.4.a. of the Decree (the "Initiating Letter"). On December 27, 2007, Abercrombie responded  
 12 to the Initiating Letter, summarizing the arguments they had set forth in their July 5 letter, in  
 13 compliance with § X.B.4.b. of the Decree.

14                   Based on their October 2007 agreement, the meet and confer requirements of §  
 15 X.B.4.c. were waived. This left the parties free to conduct discovery under § X.B.4.d. and/or  
 16 bring a motion under § X.B.4.e. A hearing in early March 2008 was anticipated.

17                   On February 28, 2008, Plaintiffs provided the Special Master and Abercrombie  
 18 with discovery requests: eleven interrogatories and two document requests. On February 29,  
 19 2008, the Special Master instructed the parties to meet and confer to agree on a schedule for  
 20 discovery, briefing, and a hearing. On March 4, 2008, Plaintiffs proposed a schedule for  
 21 resolution of the dispute:

22                   April 11, 2008	Discovery to be completed
23                   April 24, 2008	Plaintiffs' motion to be submitted
24                   May 9, 2008	Abercrombie's response to be submitted
25                   May 16, 2008	Hearing before the Special Master

26                   Abercrombie did not respond to the proposed schedule.

27                   On March 12, 2008, Abercrombie submitted a Motion to Dismiss (as well as  
 28 Motion to Stay Discovery). In its Motion, Abercrombie took the position that Section X.C.1 (a)

1 and (b) were the sole means of remedying non-compliance with the marketing diversity  
 2 requirement. In essence, Abercrombie's Motion sought a declaratory judgment that the Special  
 3 Master or the Court has no authority under Section V of the Decree to "enter[] all orders,  
 4 authorized hereunder, that may be necessary to implement the relief provided" with respect to the  
 5 marketing diversity requirement. Decree, § V. Abercrombie's Motion and the Special Master's  
 6 Decision adopting it are not supported by the language of the Decree and the Court should  
 7 overturn the Special Master's Decision and deny Abercrombie's Motion.

8 **III. ARGUMENT**

9           **A. Abercrombie's Obligation To Reflect Diversity In Its Marketing Is Not**  
 10           **Limited Or Qualified In Any Respect And Is Subject To The Review And**  
              **Assessment Of The Monitor For Compliance**

11           The marketing diversity requirement is not limited or qualified anywhere in the  
 12 Decree. It sets forth a mandate, and there is no condition under which Abercrombie is released  
 13 from the requirement during the term of the Decree. As Abercrombie notes, the Decree limits the  
 14 circumstances under which Plaintiffs can independently assert that Abercrombie violated the  
 15 requirement. Decree, § X.C.1 (a)-(b). But these limitations on Plaintiffs do not create limitations  
 16 or qualifications on Abercrombie's obligation to comply with the marketing diversity requirement  
 17 or limit the Court's power and authority to enforce the requirement pursuant to its retained  
 18 jurisdiction "to implement the relief provided." Thus, Abercrombie's compliance remains subject  
 19 to the Monitor's (and Special Master's and Court's) jurisdiction and review throughout the term  
 20 of the Decree without regard to whether the events described in subparagraphs (a) and/or (b) are  
 21 at issue. This fact is explicitly noted in Section X.C.2: "Nothing in this Section shall limit the  
 22 scope of the Monitor's discretion under Section XVI.A.2. of this Decree in evaluating compliance  
 23 (including barriers to compliance) with any of the objectives of the Decree."

24           In both his first and second annual compliance reports, the Court-Monitor found  
 25 that Abercrombie was not in compliance with the marketing diversity requirement. In response to  
 26 each report, Abercrombie has disputed the Monitor's conclusions on this issue. Plaintiffs'  
 27 Initiating Letter initiated proceedings to have the Special Master resolve the conflict between the  
 28

1 Court appointed Monitor and Abercrombie on this issue and to provide clarification regarding  
 2 how Abercrombie's compliance with the marketing diversity requirement is to be measured.<sup>5</sup>

3 Plaintiffs respectfully submit that the Special Master erred by interpreting the  
 4 limitations on Lead Counsel and the EEOC in Section X.C.1 (a) and (b) in a way that strips the  
 5 Court of its inherent power to enforce its own order. Section X.C.1 places limitations on the  
 6 remedies Lead Counsel and the EEOC may seek when they believe Abercrombie has not satisfied  
 7 the marketing diversity requirement, but these limitations do not apply to the Court. When the  
 8 parties agreed to limit or prohibit everyone, including the Court, from taking certain actions, such  
 9 as micromanaging aesthetic aspects of Abercrombie's marketing under Section X.C.2., the Court  
 10 was specifically identified. By contrast, the Court is not identified in X.C.1 as being limited in  
 11 the remedies it can impose. Plaintiffs believe it was error for the Special Master to apply the  
 12 limitations of X.C.1 (a) and (b) to the Court when they plainly only apply to Lead Counsel and  
 13 the EEOC. Plaintiffs did not agree to, and there is no evidence that the Court intended to enter,  
 14 an order that would deprive the Court of its broader Section V. authority to ensure compliance  
 15 with all aspects of the Decree, including the marketing diversity requirement.

16 Under Abercrombie's and the Special Master's interpretation, the marketing  
 17 diversity requirement could be deleted from the Decree at this point without any consequence.  
 18 By way of illustration, under this interpretation, if one deleted the marketing diversity  
 19 requirement and changed the second sentence of Section C.1. (which now reads "Lead Counsel  
 20 and/or the EEOC may assert that Abercrombie *has not met its commitment under this paragraph*  
 21 *for the following purposes only*") (emphasis added) to instead read, "the EEOC and/or Lead  
 22 Counsel may assert a lack of diversity in Abercrombie's marketing for the following purposes  
 23 only," the effect would be exactly the same. This interpretation makes the *commitment* by  
 24 Abercrombie to reflect diversity in its marketing totally illusory. It reduces diversity in marketing  
 25 to a mere factor that the Special Master or Court can consider, and even then, only when the  
 26 EEOC and/or Lead Counsel are seeking the limited relief identified in C.1.(a) or (b). Plaintiffs

27 <sup>5</sup> Plaintiffs sought discovery focused on ascertaining the basis for Abercrombie's disagreement  
 28 with the Monitor's Report regarding compliance with Section X.C.1., but the Special Master  
 stayed the discovery pending the resolution of Abercrombie's motion to dismiss.

1 respectfully assert that the Special Master's interpretation is incorrect. The Decree does not refer  
 2 to the marketing diversity requirement as a mere "factor," to be considered or discussed only  
 3 under the circumscribed conditions of C.1 (a) or (b). The Decree states that "Abercrombie *will*  
 4 reflect diversity" and refers to this as Abercrombie's "*commitment*" under the Decree. Decree, §  
 5 X.C.1. (emphasis added).

6 By adopting Abercrombie's interpretation of Section X.C., the Special Master's  
 7 Decision renders the marketing diversity requirement meaningless. While the language of the  
 8 marketing diversity requirement is clear, under the Special Master's Decision, no one – not even  
 9 the Court – has the authority to actually require Abercrombie to live up the marketing diversity  
 10 requirement. According to the Special Master's Decision and Abercrombie's interpretation, the  
 11 last sentence of Section X.C.2., which limits the parties and the Court from micromanaging  
 12 aesthetic aspects of the marketing by selecting or prohibiting particular models, photos, layouts,  
 13 etc., should be interpreted to completely nullify the marketing diversity requirement. The effect  
 14 of the Special Master's Decision and Abercrombie's interpretation is to insert into the list of  
 15 prohibitions contained in the last sentence of Section X.C.2., a prohibition against the Court  
 16 requiring that Abercrombie reflect diversity in its marketing materials. But no such language  
 17 exists in Section X.C.2, or anywhere else in the Decree. And for good reason. It would directly  
 18 contradict and nullify another term of the Decree, the marketing diversity requirement. Plaintiffs  
 19 respectfully submit it was error for the Special Master to interpret the relatively ambiguous  
 20 language of Section X.C.2 as a nullification of the clear mandate of the marketing diversity  
 21 requirement of Section X.C.1.

22 **B. Plaintiffs May Bring This Issue of "Implementation of the Relief Provided"  
 23 By The Decree To The Attention of the Court Or Special Master**

24 Plaintiffs believe the Special Master erred by ruling that Plaintiffs may not bring  
 25 this issue of compliance to the Special Master or Court. Plaintiffs have "the right to initiate steps  
 26 to resolve any dispute or issue of compliance regarding any provision of the Decree subject to  
 27 limitations and standards set forth in the Decree." Decree, § X.B.4. The dispute Plaintiffs seek to  
 28 initiate steps to resolve is between the Court-appointed Monitor and Abercrombie on the issue of

1      Abercrombie's compliance with § X.C.1. Plaintiffs' Initiating Letter relies solely on the findings  
 2      of the Monitor contained in his Reports and makes no independent assertions regarding  
 3      Abercrombie's compliance with § X.C.1. As discussed above, there is no limitation on  
 4      Abercrombie's obligation to comply with the requirements of the marketing diversity  
 5      requirement, and, likewise, there is no limitation on the authority of the Monitor to review and  
 6      assess Abercrombie's compliance therewith. Moreover, the Monitor's findings with respect to  
 7      Abercrombie's noncompliance are not limited in use or application to the circumstances  
 8      described in § X.C.1(a)-(b).

9              The Special Master adopted Abercrombie's interpretation that Section X.C.1. of  
 10     the Decree prohibits Plaintiffs from initiating this proceeding. The language of Section X.C.1. is  
 11     not as broad as the Special Master and Abercrombie suggest.<sup>6</sup> Its limitation on Plaintiffs only  
 12     relates to when *Plaintiffs* "may assert that Abercrombie has not met its commitment under this  
 13     paragraph." It does not limit the circumstances under which the *Monitor* may assert that  
 14     Abercrombie has not met its commitment under § X.C.1. The action that Abercrombie seeks to  
 15     prevent the EEOC and Lead Counsel from initiating is based upon the assertion of the Court  
 16     appointed Monitor (not an independent assertion of Plaintiffs) that Abercrombie has not satisfied  
 17     the marketing diversity requirement.<sup>7</sup>

18      **IV. CONCLUSION**

19              For the reasons set forth above, Plaintiffs respectfully request that the Court  
 20     overturn the Special Master's Decision and enter an Order declaring that the Monitor's use of  
 21     census numbers to measure compliance with the marketing diversity requirement is appropriate  
 22     and further order the parties to meet and confer with the Monitor regarding what steps  
 23     Abercrombie should take to ensure future compliance with the marketing diversity requirement.

24  
 25  
 26     <sup>6</sup> Reliance on the "subject to limitations and standards set forth in the Decree" language in  
 27     Section X.B.4. merely begs the fundamental question of what the limitations and standards are.

27     <sup>7</sup> Regardless, as described above, the Court has inherent supervisory power over the parties, and  
 28     as confirmed in Section V., which refers to the Court's authority to "enter[] all orders, authorized  
 hereunder, that may be necessary to implement the relief provided."

1 Respectfully submitted,

2 Dated: May 20, 2008

By: /s/ Jahan C. Sagafi

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